DONA ANA BOARD OF COUNTY COMMISSIONERS

IBLA 89-386 Decided September 17, 1990

Appeal from a decision of the Las Cruces District Office, Bureau of Land Management, terminating Recreation and Public Purpose lease NM 42181.

Affirmed as modified.

1. Recreation and Public Purposes Act--Regulations: Interpretation--Rules of Practice: Hearings

   Although 43 CFR 2912.1-1(c) appears to provide that notice and an opportunity for a hearing are only available to a recreation and public purpose lessee when BLM is contemplating termination of the lease for an inconsistent use, but not where there is nonuse, the preamble to the final promulgation of 43 CFR 2912.1-1(c) clearly indicates that the Department intended that notice and opportunity for a hearing be extended to the lessee where termination is sought for inconsistent use or for nonuse.

2. Recreation and Public Purposes Act--Rules of Practice: Hearings

   The purpose of providing a person with notice and an opportunity for a hearing prior to termination of a recreation and public purpose lease is to guarantee that person's right to due process prior to finalization of the action of termination. The "opportunity for a hearing" does not mean, however, that in all cases the Department must conduct a fact finding hearing. A hearing is not required in the absence of assertions of fact which, if proved true, would entitle the person to the relief sought.

APPEARANCES: Judd S. Conway, Esq., Las Cruces, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Board of County Commissioners of Dona Ana County, New Mexico (County), has appealed from a March 8, 1989, decision of the Las Cruces District Office, Bureau of Land Management (BLM), terminating lease NM 42181 issued pursuant to the Recreation and Public Purposes Act (R&PP Act), 43 U.S.C. §§ 869 through 869-4 (1982).

On May 12, 1983, BLM issued the 40-acre lease to the County for a sanitary landfill site in the E½ SW¼ NE¼ and W½ SE¼ NE¼ of sec. 8, T. 22 S., R. 2 E., New Mexico Principal Meridian, for a period of 25 years with a rental rate of $10 per year. Section 4(e) of the lease provided in relevant part:

> That this lease may be terminated after due notice to the lessee upon a finding by the authorized officer that the lessee had failed to comply with the terms of the lease; or has failed to use the leased lands for the purposes specified in this lease for a period of 2 consecutive years; * * *.

The lease also provided that the lessee would improve and manage the leased area according to an attached Plan of Management containing stipulations providing for fencing, signing, and access specifications, listed archaeological and environmental considerations, and specified that "[n]on-compliance with county, State, or Federal regulations or failure to observe the terms and conditions of the lease will result in cancellation of the lease" (Plan of Management-Stipulation 10).

A BLM report in the case file, dated January 16, 1984, notes that a field examination verified the existence of fencing and a disturbed area on the site. BLM inspection reports, dated March 29, October 3, and December 7, 1988, observed that this landfill site was never opened. 1/ By letter dated December 22, 1988, BLM notified the County that by failing to use the site for a period of 2 consecutive years, the County had not complied with the terms of the lease. BLM warned that it would act to terminate the lease in 60 days, absent corrective action or the furnishing of adequate justification as to why the lease should not be terminated. The County received BLM's letter on December 23, 1988, but did not respond.

On March 8, 1989, BLM issued its decision terminating lease NM 42181 because the leased lands had never been used for the purpose specified in the lease. BLM based its decision on section 4(e) of the lease and on regulation 43 CFR 2912.1-1(c), both of which allow a lease to be terminated after 2 consecutive years of nonuse.

On appeal, the County seeks to excuse its failure to respond to BLM's notice by stating that BLM's December 22 notice was delivered to the County immediately after the resignation of the County Manager "amid some controversy," and that at such time "the lines of authority within the County were somewhat unclear and the notice with its requirement of response within a fixed time was mislaid."

The County argues that it has taken steps to develop the land for the purposes for which it was leased, stating that "[i]n anticipation of the future development of the Twin Peaks Solid Waste Disposal Site, Dona Ana County has committed funds and force account work" for surveys, fencing,
and right-of-way acquisition. The County asserts it spent over $42,000 on one access road and scheduled additional expenditures to be used for that road. Further, the County notes the proximity of the site to the City of Las Cruces would lower hauling costs and the site itself is hidden from

view by a mountain. Finally, the County states it has complied with BLM requirements and wishes to retain the solid waste disposal site for future development.

Section 2 of the R&PP Act, 43 U.S.C. § 869-1 (1982), provides in relevant part as follows:

> Each lease shall contain a provision for its termination upon a finding by the Secretary that the land has not been used by the lessee for the purpose specified in the lease for such period, not over five years, as may be specified in the lease, or that such land or any part thereof is being devoted to another use.

This statute dictates that such leases be terminated when not used for the requisite period of time. Both the regulation, 43 CFR 2912.1-1(c), which was promulgated pursuant to the R&PP Act, and section 4(e) of the lease contain similar provisions.

[1] The applicable regulation, 43 CFR 2912.1-1(c), provides:

> Leases shall be terminable by the authorized officer upon failure of the lessee to comply with the terms of the lease, upon a finding, after notice and opportunity for hearing, that all or part of the land is being devoted to a use other than the use authorized by the lease, or upon a finding that the land has not been used by the lessee for the purpose specified in the lease for any consecutive period specified by the authorized officer. The specified period of non-use or unauthorized use shall not be less than 2 years nor more than 5 years.

Although the plain meaning of that regulation appears to be that the "notice and opportunity for hearing" provision applies only to the inconsistent use situation and not to the nonuse situation, such a distinction makes little sense and is, in fact, contrary to the intent of the Department in promulgating the regulation. In the preamble to the final rulemaking for 43 CFR 2912.1-1(c), the Department stated:

> A comment pointed out that § 2912.1-1(c) makes no provision for notice and hearing in connection with a revocation and suspension of "any instrument providing for use, occupancy or development of public lands," as provided in section 302 (c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C.

1/ There is some discrepancy in these reports regarding fencing of the site. Each of the reports contains a description, "Secured by adequate fencing" followed by boxes designated "Yes" and "No." The "Yes" box is checked on the March report; the "No" box is checked on the other two reports. The same individual signed all three reports.

> 1732). This suggestion has been adopted and § 2912.1-1(c) has been amended to provide for notice and opportunity for a hearing.

44 FR 43371 (July 25, 1979).

It appears clear from this comment that the Department intended that notice and opportunity for a hearing be extended to the lessee where ter-mination is sought for inconsistent use or nonuse. 2/

In this case, BLM did not notify the County that it had an opportunity for a hearing; nevertheless, it did provide notice of termination, which was, in fact, received by the County. Presumably, even if the opportunity for a hearing had been offered in the notice, the County would not have availed itself of that opportunity since it alleges that no timely response was made because the notice was "mislaid." Thus, we must conclude that, under the circumstances, and in the absence of any response from the County, BLM properly terminated the lease. That does not end our inquiry, however.

[2] On appeal, for the first time, the County has made allegations regarding its "use" of the site. It does not follow, however, given the present posture of the case that we must automatically refer this case for a hearing.

The purpose of providing a person with notice and an opportunity for a hearing prior to termination of an R&PP lease is to guarantee that per- son's right to due process prior to finalization of the action of termination. The "opportunity for a hearing" does not mean, however, that in all cases the Department must conduct a fact finding hearing. A hearing is not required in the absence of assertions of fact which, if proved true, would entitle the person to the relief sought. John D. Archer, 75 IBLA 128, 132 (1983); Anita Robinson, 71 IBLA 380 (1983). Accordingly, under the circumstances, we will determine whether the County's allegations regarding "use" of the site are sufficient to warrant granting a hearing.

2/ The Department amended the regulation to provide for notice and an opportunity for a hearing, but in doing so it limited the amendment to terminations of leases. In San Juan County, 102 IBLA 155, 95 I.D. 61 (1988), BLM suspended R&PP leases because it alleged that hazardous wastes had been disposed of at the sites in violation of the lease terms. The County appealed, and we referred the case for a hearing based on the proce-dural requirements in section 302(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(c) (1982). We held that BLM could only suspend or revoke an R&PP lease for violation of one or more of its terms and conditions after providing the section 302(c) mandated procedure of "notice and opportunity for a hearing." San Juan County did not discuss 43 CFR 2912.1-1(c), which, in fact, dictates the procedure for termination (revocation) of an R&PP lease. However, as indicated by the preamble lan-guage quoted above, the 43 CFR 2912.1-1(c) procedure is derived from section 302, and the facts in San Juan County actually involved a suspension of a lease, an action not covered by 43 CFR 2912.1-1(c).

The stipulations attached to the lease in this case make clear that use of the site for the disposition of waste could not have commenced immediately following issuance of the lease in May 1983. The stipulations provided for a number of actions to be taken by the county, such as construction of an access road, a fence and a cattle guard, as well as erection of signs, all to be available for inspection by the District Manager "prior to any use of the site." See Stipulation 7 of the lease. Therefore, the County was on notice that it had to satisfy a number of conditions precedent before using the site as a landfill.

The allegations made by the County on appeal all relate to preparatory actions which would need to be undertaken "prior to any use of the site." Such allegations do not justify sending this case for a hearing, since even if we accept those assertions regarding actions taken relating to the site as true, such actions do not establish "use" of the site for the purpose set forth in the lease.

Therefore, although BLM erred in failing to offer the County the opportunity for a hearing in accordance with 43 CFR 2912.1-1(c), that failure does not constitute reversible error in this case or necessitate referring this case for a hearing. The allegations made by the County on appeal do not establish any material factual dispute which would justify the time and expense of a hearing. Under the facts of this case, the County's opportunity for a hearing was satisfied by its appeal to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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John H. Kelly
Administrative Judge

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Bruce R. Harris
Administrative Judge